No. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

REPLY BRIEF FOR APPELLANTS

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Appellants Robert A. Rucho, David R. Lewis, Timothy K. Moore, and Philip E. Berger

March 19, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
ARGUMENT 2
I. Plaintiffs Lack Standing. 2
II. Partisan Gerrymandering Claims Are Nonjusticiable 6
A. The Framers Textually Committed to Congress Federal Oversight Over Excessive Partisanship in Districting 7
B. There Are No Judicially Discernible or Manageable Standards for Adjudicating Partisan Gerrymandering Claims 11
III. The District Court's Standards Are Not Judicially Discernible And Manageable 18
1. Equal Protection Clause 18
2. First Amendment 20
3. Sections 2 and 4 of Article I 22
IV. The 2016 Map Is Not An Unconstitutional Partisan Gerrymander In All Events 23
CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Baker v. Carr,
369 U.S. 186 (1962) 7, 8, 11

City of Mobile v. Bolden,
446 U.S. 55 (1980) 4

Davis v. Bandemer,
478 U.S. 109 (1986) ..... *passim*

Elrod v. Burns,
427 U.S. 347 (1976) 21

Gaffney v. Cummings,
412 U.S. 735 (1973) 23

Gill v. Whitford,
138 S. Ct. 1916 (2018) ..... *passim*

Harris v. Ariz. Indep. Redistricting Comm'n,
136 S. Ct. 1301 (2016) 13

Hunt v. Cromartie,
526 U.S. 541 (1999) 13, 14, 25

McLaughlin v. Florida,
379 U.S. 184 (1964) 9

Nixon v. United States,
506 U.S. 224 (1993) 8, 9, 18

Powell v. McCormack,
395 U.S. 486 (1969) 9

United States v. Hays,
515 U.S. 737 (1995) 2

Vieth v. Jubelirer,
541 U.S. 267 (2004) ..... *passim*

Wesberry v. Sanders,
376 U.S. 1 (1964) 9

Statute

52 U.S.C. §10301(b) 4

Other Authorities

Br. for Appellants, *Vieth v. Jubelirer*, No. 02-1580 (U.S. Aug. 29, 2003) 12, 13

Compl., *Whitford v. Gill*, No. 3:15-cv-00421-bbc (W.D. Wis. July 8, 2015), ECF No. 1 12

Debates on the Federal Constitution (J. Elliot 2d ed. 1836) 10, 11

The Federalist No. 59 (Charles R. Kesler ed., 1961) 10

The Federalist No. 78 (Charles R. Kesler ed., 1961) 9

Montesquieu, *Spirit of Laws* 10

Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 Harv. J.L. & Pub. Pol'y 341 (2016) 10

Thomas L. Friedman, Opinion, *Is America Becoming a Four-Party State?* N.Y. Times (Feb. 19, 2019), https://nyti.ms/2ElO5bd 16

REPLY BRIEF

For three decades and counting, this Court has struggled to determine "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines." *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018). Plaintiffs' briefs underscore why that endeavor has proven fruitless. Plaintiffs cannot even agree amongst *themselves* on who has standing, which constitutional provisions govern, or what standard applies. Indeed, of the four tests the district court proposed, there is not a single one that both sets of plaintiffs squarely embrace.

Plaintiffs' discord is a product of two basic realities: The framers assigned the inherently political task of districting to political actors, and they gave the judiciary no tools or text to discern judicially manageable standards. The Common Cause plaintiffs embrace the view that no amount of districting for partisan advantage is permissible, but that radical proposition is inconsistent with decades of judicial precedent and the framers' decision to assign the task to state legislatures and Congress. The League plaintiffs concede that some partisan motivation is inevitable and permissible, but they fail to answer "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth v. Jubelirer*, 541 U.S. 267, 296-97 (2004) (plurality op.). The Constitution does not provide an answer to that question because the framers protected the essential independence of the Article III courts by wisely shielding them from an issue that is "root-and-branch" a political question. *Id.* at 285.

ARGUMENT

I. Plaintiffs Lack Standing.

Federal courts have neither the responsibility nor the power to vindicate "group political interests" or "generalized partisan preferences." *Gill*, 138 S. Ct. at 1933. That principle suffices to dispose of this case, as plaintiffs have not identified any concrete and particularized individual injury.

The League plaintiffs prudently decline to defend the district court's holding that they suffered so-called "non-dilutionary" injuries, JS.App.69-74, which suffers all the same problems as the amorphous standing theories rejected in *Gill*. The Common Cause plaintiffs' efforts to defend that holding prove the point. In their view, they have standing to challenge any law that impedes their ability to "mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." CC.Br.31. Indeed, they blithely insist that a Democrat who lives in Asheville *should* be able to challenge alleged gerrymandering in a district across the State because "Democrats from Asheville fundraise for candidates in Fayetteville." CC.Br.33.

This Court has never accepted such a radical conception of Article III injury and squarely rejected it in *Gill*, concluding that "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). As *Gill* recognized, the notion that a plaintiff has

standing simply because gerrymandering—whether in his own district or another—allegedly has impeded his "ability to engage in campaign activity," *id.* at 1925, has breathtaking implications. All manner of laws could plausibly be alleged to impede someone's ability to persuade people to engage in the political process. Indeed, if that were enough, why stop in Asheville: A Virginia or California voter with a keen interest in North Carolina politics would suffer comparable "injuries." In short, "non-dilutionary" is a useful shorthand for generalized injuries that do not suffice under *Gill*.

The League plaintiffs focus exclusively on their alleged "dilutionary" injuries, but to no avail. They concede that they lack "dilutionary" injuries in four districts—CD3, CD5, CD10, and CD11—because those districts remained heavily Republican under their own proposed map. LWV.Br.9 n.2. But they insist that various (still-unidentified) members have standing to challenge the nine remaining districts—even those that elected their preferred candidates. Take CD4, in which Democrat David Price has handily won 12 elections straight. According to the League, a Price-supporter has standing to challenge that district because it could have been drawn so that Price could secure a narrower win with 53% of the vote instead of 63%. LWV.Br.33.

That contention is fundamentally at odds with *Gill*. The only benefits to a Price-supporting CD4 resident of having Price re-elected more narrowly are benefits from redeploying likely Democratic voters outside the district to "influenc[e] the legislature's *overall* 'composition.'" *Gill*, 138 S. Ct. at 1931

(emphasis added). This Court has never "found that this presents an individual and personal injury of the kind required for Article III standing." *Id.* To the contrary, *Gill* squarely rejected the notion that such extra-district interests sufficed. "A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Id.* Plaintiffs' interest in seeing voters of their preferred political persuasion more efficiently distributed elsewhere is a classic "nonjusticiable 'general interest common to all members of the public.'" *Id.*

This Court's vote dilution cases do no suggest otherwise. The kind of "vote dilution" alleged here bears no relationship to vote dilution in the one-person-one-vote context, where an individual's vote is diluted in the concrete sense that it actually carries less weight than it would in the less-populated district next door. And while plaintiffs try to analogize to §2 claims, they misunderstand the role that "vote dilution" plays in that context. Unlike overpopulating a district, "cracking" and "packing" does not "dilute" an *individual's* vote. *See City of Mobile v. Bolden*, 446 U.S. 55, 67-69 (1980) (plurality op.). It dilutes only the voting strength of a *group* of voters.

That suffices in the §2 context because Congress has prohibited laws that give "members of a class protected by" §2—*i.e.*, racial minorities—"less opportunity than other members of the electorate ... to elect representatives of their choice." 52 U.S.C. §10301(b). But neither the Voting Rights Act nor the Constitution extends the same protection to members of mainstream political parties. "Clearly,

members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group." *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). And to conclude that individuals suffer an individualized injury whenever the voting strength of *any* group with which they affiliate has been diluted would effectively empower every voter in the State to bring a lawsuit every time her district is redrawn.

That leaves (at most) three districts in which a different map might have allowed a district resident to elect his favored candidate. CC.Br.14. But even that does not state a cognizable Article III injury under the logic, if not the holding, of *Gill*. Someone who is not divvied up by race and whose vote is weighted equally does not suffer an individualized injury just because his preferred candidate is not elected. Voters are not entitled to have their districts drawn so that their preferred candidate wins, and few voters are lucky enough to live in such districts. Even a voter in a safe district favoring his own party may prefer a more conservative or moderate candidate, but being denied that opportunity, even when a different map would enable it, simply does not constitute Article III injury. Again, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Gill*, 138 S. Ct. at 1931. As long as that right is afforded, he does not have any constitutionally protected interest in a district drawn to promote his favored outcome.

II. Partisan Gerrymandering Claims Are Nonjusticiable.

Plaintiffs' claims face the even more substantial obstacle that they are nonjusticiable. Plaintiffs' first line of defense is to insist that this Court has already resolved justiciability in their favor. CC.Br.33; LWV.Br.33. That is difficult to square with this Court's conclusion just last Term that "[o]ur considerable efforts ... leave unresolved ... whether [partisan gerrymandering] claims are justiciable." *Gill*, 138 S. Ct. at 1929. In *Vieth*, a plurality of this Court decried "eighteen years of judicial effort with virtually nothing to show for it." 541 U.S. at 281. The tally has now reached 33 years, and the courts are no closer to divining judicially administrable standards. The time has come to replace plurality opinions with a definitive holding of the Court that partisan gerrymandering claims are nonjusticiable.[1] The two most important nonjusticiability factors—a textual commitment to another branch and a lack of judicially manageable standards—point in the same direction and make clear that "the judicial department has no business entertaining" partisan gerrymandering claims. *Id.* at 277.

---

[1] To the extent *Bandemer* needs to be formally interred, *stare decisis* considerations fully justify that course. As the *Vieth* plurality observed, there are no meaningful reliance interests at stake, and *Bandemer*'s claim to *stare decisis* is "triply weak." 541 U.S. at 305-06.

A. The Framers Textually Committed to Congress Federal Oversight Over Excessive Partisanship in Districting.

In Article I, §4, Clause 1, the framers textually committed the power to draw congressional districts to state legislatures, and they textually committed federal oversight of whether state districting laws are "too political" or "too partisan" to Congress. In expressly delegating primary responsibility to the entity most susceptible to political and partisan influences, and delegating oversight to the federal body most subject to those same influences, the framers recognized that districting was "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality op.). The framers thus not only textually delegated federal oversight of claims of excessive partisanship to Congress, but recognized that such a role would be affirmatively inappropriate for Article III courts that depend on their independence from partisan politics to discharge their core function.

Plaintiffs' principal responses to this argument are to deem it novel and (somewhat paradoxically) "definitively rejected" in *Baker v. Carr*, 369 U.S. 186 (1962). CC.Br.35; LWV.Br.41-42. But there is nothing novel about recognizing that the framers adopted a structural solution to the inherently political problem of partisan gerrymandering. The *Vieth* plurality emphasized that "[t]he Constitution clearly contemplates districting by political actors, see Article I, § 4," and that Congress has not been shy about exercising its oversight responsibility. 541 U.S. at 285. And *Baker* certainly did not resolve—or even

address—whether there was a textual delegation with respect to partisan gerrymandering claims.

In insisting otherwise, plaintiffs miss *Baker*'s central lesson: Justiciability depends on the precise nature of the claim asserted. *Baker* reaffirmed decades of precedents finding malapportionment claims under the Guarantee Clause nonjusticiable, but nonetheless held a malapportionment claim premised on the Equal Protection Clause justiciable. *See* 369 U.S. at 226-27. And *Baker* clarified that not every "Fourteenth Amendment claim" is justiciable, as some will be "enmeshed with ... political question elements." *Id.* Similarly, in *Nixon v. United States*, this Court found a textual commitment to the Senate in the Impeachment Clause for a complaint about the Senate's use of a committee in conducting an impeachment trial, but did not suggest that a complaint about the Senate's failure to follow the Clause's "quite precise" requirements that Senators be under oath and conviction occur by a two-thirds vote would be nonjusticiable. 506 U.S. 224, 230 (1993). The central lesson of *Baker* and *Nixon* is that the existence of a textual commitment depends on the precise nature of the claim asserted.

Plaintiffs' hyperbolic claims that finding a textual commitment in this context would render nonjusticiable every case involving federal elections therefore ring hollow. LWV.Br.44; CC.Br.37. Partisan gerrymandering claims are fundamentally different from racial gerrymandering and malapportionment claims, on both the textual-commitment question and the bottom-line issue of justiciability. In the racial gerrymandering context,

the textual commitment in the Elections Clause must be reconciled with the Equal Protection Clause's clear command "to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). In the malapportionment context, the Elections Clause must be weighed against "the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964).

Again, *Nixon* is instructive. *Nixon* distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), on the basis that judicial intervention was necessary there to vindicate the Qualifications Clause. 506 U.S. at 240. Here, by contrast, as in *Nixon*, "there is no separate provision of the Constitution that could be defeated," *id.* at 237, by recognizing a textual delegation to Congress when it comes to amorphous claims that the political entity assigned responsibility for districting acted too politically. To the contrary, no provision of the Constitution suggests any textual limits, let alone judicially enforceable limits, on how much politics or partisanship is too much. And as *Nixon* recognized, the first two *Baker* factors are "not completely separate." *Id.* at 228. A textual delegation to another branch may explain the lack of any textual source for judicially manageable standards, and "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 228-29.

Plaintiffs' efforts to resist the history underscoring that textual commitment fall flat. Invoking *The Federalist* No. 78, the Common Cause

plaintiffs try to infer from general statements about the role of the judiciary as "an intermediate body between the people and the legislature" that Alexander Hamilton would have welcomed judicial supervision of partisan gerrymandering claims. CC.Br.38. But far more relevant is *The Federalist* No. 59, in which Hamilton directly addressed the Elections Clause and its textual delegations of power. There, Hamilton "readily conceded[] that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." *Id.* at 360 (A. Hamilton) (Charles R. Kesler ed., 1961). Conspicuously absent from that list is any role for the judiciary—presumably because Hamilton himself recognized (in none other than *The Federalist* No. 78) that such a role would threaten the judiciary's essential independence, as "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" *Id.* at 465 (A. Hamilton) (quoting Montesquieu, *Spirit of Laws*, vol. i, p.181).

The League plaintiffs suggest that, during the Virginia ratifying convention, James Madison hinted at federal-court oversight of state election laws. *See* LWV.Br.45. In fact, the "sufficient security against abuse" that Madison identified was none other than *Congress'* control under the Elections Clause. 3 *Debates on the Federal Constitution* 408 (J. Elliot 2d ed. 1836); *see also id.* at 367; *cf.* Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 Harv. J.L. & Pub. Pol'y 341, 351 (2016). They also point to James Steele's comments at the North Carolina

ratifying convention. LWV.Br.45. But Steele was suggesting only that courts could intervene if *Congress* abused its Elections Clause power by passing laws that eliminated or impeded *the right to vote*. *See* 4 *Debates* 71. That neither Steele nor anyone else even hinted at the notion that federal courts could examine state districting maps for excessive partisanship is powerful evidence that "the judicial department has no business entertaining" partisan gerrymandering claims. *Vieth*, 541 U.S. at 277 (plurality op.).

B. There Are No Judicially Discernible or Manageable Standards for Adjudicating Partisan Gerrymandering Claims.

The second nonjusticiability factor points just as strongly in the same direction: As decades of unproductive "judicial effort" and "essentially pointless litigation" have confirmed, *id.* at 306, there are no "judicially discoverable and manageable standards for resolving" partisan gerrymandering claims, *Baker*, 369 U.S. at 217. The fundamental problem is that, given that the framers delegated districting authority to "political entities," virtually no one, save the district court and the Common Cause plaintiffs, thinks that *any* amount of political or partisan motivation is *malum in se*. But as a result, such claims inevitably devolve into "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.).

Predictably, plaintiffs try to duck that question. They first make the puzzling claim that this Court can hold the 2016 Map unconstitutional without deciding whether partisan gerrymandering claims are

justiciable. CC.Br.40; LWV.Br.48. But this Court cannot invalidate a state law while remaining *dubitante* on the justiciability of the doctrine that does the invalidating. Nor can this Court plausibly declare the 2016 Map "the most extreme[] partisan gerrymander," CC.Br.1, without developing a scale for what makes a partisan gerrymander problematic. Not surprisingly, plaintiffs' most-extreme-ever claim mirrors comparable claims in prior partisan gerrymandering cases almost verbatim. Last Term, the *Gill* plaintiffs insisted that Wisconsin's map was "by any measure, one of the worst partisan gerrymanders in modern American history." Compl. ¶1, *Whitford v. Gill*, No. 3:15-cv-00421-bbc (W.D. Wis. July 8, 2015), ECF No. 1. The *Vieth* plaintiffs similarly described Pennsylvania's plan as "the paradigmatic example of an extreme partisan gerrymander." Br. for Appellants 41, *Vieth*, No. 02-1580 (U.S. Aug. 29, 2003) ("*Vieth* Appellants Br.").

These repeated hyperbolic claims suggest that claiming extremity by any measure is no substitute for having a discernible standard for measurement. Certainly, the North Carolina map is not the most extreme when it comes to deviation from traditional districting principles, as it outperforms any North Carolina congressional map in recent memory on that standard. *See infra* Part IV. Instead, plaintiffs seem to view it as extreme largely because the legislature forthrightly acknowledged that it considered partisan advantage in drawing the map. But that hardly distinguishes this case from *Vieth*, in which the plaintiffs emphasized that the legislature "frankly admitted" its goal "to maximize the number of Republicans elected to Congress." *Vieth* Appellants

Br.1; *see also Bandemer*, 478 U.S. at 116 n.5 (recounting deposition testimony from Speaker that "operative" goal of map was "to save as many incumbent Republicans as possible"). More fundamentally, there can be no constitutional violation in acknowledging partisan motivation if such motivation is not unconstitutional.

Plaintiffs insist that this Court has never held that "raw partisan advantage is a permissible—as opposed to merely a common—motivation" in districting. LWV.Br.53-54; CC.Br.45. This Court has long begged to differ. *See, e.g.*, *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541, 551 (1999) ("[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering" (collecting cases)); *see also Vieth*, 541 U.S. at 286 (plurality op.) ("partisan districting is a lawful and common practice"); *Bandemer*, 478 U.S. at 164-65 (Powell, J., concurring in part and dissenting in part) (distinguishing "unconstitutional gerrymander[ing]" from "the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls"). Tellingly, the best authority plaintiffs can muster for their contrary claim is Justice Stevens' solo *dissent* in *Vieth* and a decision that "assum[ed], *without deciding*, that partisanship is an illegitimate redistricting factor." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (emphasis added).

Moreover, this Court's racial gerrymandering jurisprudence has been premised largely on the notion that racial considerations are generally impermissible, while partisan and political

considerations are fair game. *See, e.g., Cromartie I*, 526 U.S. at 551. If political considerations are off the table as well, then districting will be radically transformed. That underscores the fundamental difference between trying to eliminate an impermissible consideration like race and trying to eliminate a consideration deemed all but inevitable for two centuries. The notion that judicially manageable standards for policing the latter have been lurking unnoticed in the Elections Clause and First and Fourteenth Amendments for centuries beggars all belief.

At any rate, even plaintiffs cannot deny that this Court has repeatedly rejected the proposition that districting for partisan advantage alone renders a map unconstitutional. If partisan gerrymandering claims depended merely on determining whether the legislature districted for "raw partisan advantage," then both *Bandemer* and *Vieth* should have come out the other way. Instead, the plurality in both cases squarely rejected the proposition that "redistrict[ing] with the specific intention of disadvantaging one political party's election prospects" is itself enough to violate the Constitution, *Bandemer*, 478 U.S. at 138; *see also Vieth*, 541 U.S. at 286, and none of their colleagues disagreed.

The Common Clause plaintiffs thus fundamentally miss the mark with their strained analogy that courts do not "refus[e] to adjudicate race-discrimination or tax-fraud cases" because it "is impossible to eliminate racism from all human hearts or to prevent all tax cheating." CC.Br.46. Racism and tax-cheating are wrong even in small doses, with the

challenge being detecting impermissible motivation. The problem with partisan motivation is not that it is difficult to detect in institutions that divide themselves into partisan caucuses across literal aisles. It is that "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage" played some role in the map (and virtually all other legislation). *Vieth*, 541 U.S. at 286 (plurality op.). "As long as redistricting is done by a legislature," at least some degree of such motivation "should not be very difficult to prove." *Bandemer*, 478 U.S. at 129 (plurality op.). A test that invalidated a map any time the legislature "overt[ly]" or "[n]akedly" sought *any* "partisan advantage," CC.Br.1, 56, 58-59, thus would "commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 478 U.S. at 306 (Kennedy, J., concurring).

That is particularly true now that *Gill* has clarified that partisan gerrymandering claims, like racial gerrymandering claims, must proceed district by district. Even when legislatures are not explicit about having a statewide goal to maximize seats, they routinely draw particular district lines to advantage or disadvantage an incumbent or to capture additional Republican or Democratic voters. Thus, if this Court goes down the road of entertaining partisan gerrymandering claims, there will be no shortage of lawsuits claiming "naked," "raw," or "extreme" partisan gerrymandering.

The League plaintiffs do not defend the Common Cause plaintiffs' radical proposition that partisan gerrymandering is *malum in se*. But that leaves them in the unenviable position of trying to identify a

limited, precise, and objective test for determining "[h]ow much political motivation and effect is too much." *Id.* at 296-97 (plurality op.). Unsurprisingly, their efforts come up short. Indeed, they inevitably resort to a "form of rough proportional representation" as the constitutional baseline from which deviations can be deemed extreme, *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), proposing a "partisan asymmetry" standard that turns on whether "supporters of each of the two parties are able to translate their votes into representation with equal ease," LWV.Br.15.

But proportional representation is not "consistent" with "our history, our traditions, or our political institutions," *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and it does not become any more so by shifting the focus to whether each of the major political parties has a sufficiently "symmetrical" opportunity to achieve it.[2] Simply put, nothing in the Constitution or our Nation's history supports the novel proposition that the constitutionality of a map turns on how well Republicans and Democrats perform in districts as compared to their statewide numbers. If voters naturally distributed themselves into perfectly square districts at a uniform 60% Democratic and 40% Republican rate, so that

---

[2] The League plaintiffs never explain why this Court should embrace a constitutional rule that assumes—indeed, effectively enshrines—a two-party system. This would be a particularly odd moment to do so given that "voters' rising partisanship," LWV.Br.25, could very well lead to fractures within that system. *See, e.g.*, Thomas L. Friedman, Opinion, *Is America Becoming a Four-Party State?* N.Y. Times (Feb. 19, 2019), https://nyti.ms/2ElO5bd.

Democrats won every district and left 40% of the State's population without representation by their preferred candidates, there would be no constitutional problem—because proportional representation is not a value enshrined in the Constitution. Intentionally drawing lines to produce the same effect neither violates the Constitution nor deviates from any constitutionally valid baseline.

Plaintiffs' efforts to measure forbidden effects are no more successful than their efforts to detect forbidden intent. To the contrary, they concede that "candidates and issues do matter," CC.Br.50 n.11, that "voters' preferences can change from one election to the next," and that "electoral shifts" can cause a plan's anticipated "asymmetry" to "evaporate," LWV.Br.59. Those concessions are unavoidable, as the subsequent history of *Bandemer*, *Vieth*, and other cases have proven the wisdom of Justice O'Connor's observation that "there is good reason to think that political gerrymandering is a self-limiting enterprise." *Bandemer*, 478 U.S. at 152; *see also Vieth*, 541 U.S. at 287 n.8 (plurality op.); Op.Br.45-46; Republican Nat'l Comm. Br.6-20. Courts' woeful inability to meaningfully measure how "extreme" or "enduring" a gerrymander is has been borne out yet again in this case: The district court declared CD9 an unconstitutionally "safe" Republican district just a few months before the Republican candidate failed to secure even 50% of the vote.[3]

---

[3] CD9 is hardly the only district that deviated from the experts' predictions in 2018. CD2 had a predicted Republican vote share of 56.20%, but an actual Republican vote share of 51.27%. And CD4 had a predicted Democratic vote share of 62.32%, but an

In short, time and again it has proven "impossible to assess the effects of partisan gerrymandering" with any real confidence, which makes it just as impossible "to fashion a standard for evaluating a violation." *Vieth*, 541 U.S. at 287 (plurality op.). That is unsurprising given the framers' decision to assign that politically fraught task elsewhere. *See Nixon*, 506 U.S. at 228-29. And it reinforces the ultimate conclusion that partisan gerrymandering claims are nonjusticiable.

III. The District Court's Standards Are Not Judicially Discernible And Manageable.

The insuperable problems with the district court's four proposed tests confirm as much. Indeed, that plaintiffs themselves cannot agree on which (if any) of those tests is workable "goes a long way to establishing that there is no constitutionally discernible standard." *Vieth*, 541 U.S. at 292 (plurality op.).

1. Equal Protection Clause

The League plaintiffs defend only the district court's Equal Protection Clause test, while claiming that it somehow also manages to "capture[] ... the First Amendment injury of intentional viewpoint discrimination." LWV.Br.51. The Common Cause plaintiffs, meanwhile, defend the district court's other tests while complaining that its equal protection test is "too demanding." CC.Br.58. Plaintiffs contend that the "predominant-purpose" standard must be workable here because it has proven workable in the

---

actual Democratic vote share of 72.37%. *Compare* JA290 *with* Op.Br.20 n.3.

racial gerrymandering context. CC.Br.47. Setting aside the highly debatable premise, that ignores the fundamentally different role of the inquiry in each context. Drawing districts predominantly on the basis of race is presumptively impermissible because "the purpose of segregating voters on the basis of race is not a lawful one." *Vieth*, 541 U.S. at 286 (plurality op.). "Politics is quite a different matter." *Id.* at 307 (Kennedy, J., concurring). In this context, a predominance standard identifies only "an ordinary and lawful motive," *id.* at 286 (plurality op.)—indeed, one that has often been a basis for showing that impermissible considerations, like race, did not predominate.

As for the effects prong, the League plaintiffs maintain that "a map is dilutive if" it "create[s] a large and durable advantage for the line-drawing party." LWV.Br.55. But while they have no shortage of methods by which a plaintiff may try to make this showing, they never explain how "large" or "durable" the advantage must be. Instead, they contend that it "would ... have been odd" for the district court to flesh out these seemingly critical details. LWV.Br.59. But the district court not only announced this test but purported to apply it to invalidate a duly enacted map, so supplying some details does not seem too much to ask.

Finally, no plaintiff seriously grapples with the problem that the district court's "justification" prong just reverses the burden of proof. That might work if its intent and effects tests were demanding tests that isolated rare instances of presumptively unconstitutional behavior. But shifting the burden to

the legislature based on an intent test that asks only whether legislators acted like legislators and an effects test that asks whether they were any good at implementing their intent (to some undefined degree) looks a lot more like judicial preclearance than any readily administrable test that comports with the presumption of good faith and constitutionality. Demanding that state legislatures come into court and explain why they did not draw "fairer" maps is not our usual mode of adjudication, and it is certainly not what the framers envisioned in granting districting authority to state legislators.

2. First Amendment

Unlike the League plaintiffs, the Common Cause plaintiffs wholeheartedly embrace the district court's First Amendment test, insisting that the 2016 Map "burdens protected activity" on various impermissible bases. CC.Br.54-55. But they conveniently ignore the glaring problem that partisan gerrymandering does not even regulate—let alone "restrict" or "enhance," CC.Br.54—any activity protected by the First Amendment. "Plaintiffs are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." JS.App.344. Their only complaint is that the map purportedly has made those First Amendment activities *less effective*. If that were enough to convert a law into a presumptively unconstitutional burden on speech or association, then there would be no end to the laws that could be challenged on First Amendment grounds.

Plaintiffs cannot escape that problem by trying to reconceptualize partisan gerrymandering as a form of viewpoint discrimination or retaliation, as that path "would render unlawful *all* consideration of political affiliation in districting." *Vieth*, 541 U.S. at 294 (plurality op.). Plaintiffs insist that their test is meant to capture only "*invidious* discrimination," by which they mean considering political affiliation to achieve partisan advantage. CC.Br.56. But "adding the modifier" invidious (or "raw" or "extreme"), *Vieth*, 541 U.S. at 298 (plurality op.), does not explain how a practice that the framers not only tolerated but encouraged (by assigning responsibility for districting to political actors) has suddenly become an abridgment of free speech.

The First Amendment, moreover, does not draw any distinction between "benign" and "invidious" viewpoint discrimination or retaliation. "What cases such as *Elrod* v. *Burns*, 427 U.S. 347 (1976), require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*." *Id.* at 294. Accordingly, if sorting voters based on political affiliation to help the prospects of one political party is unconstitutional, then so is sorting voters based on political affiliation to make districts "more competitive." Plaintiffs cannot take what they like of First Amendment doctrine and discard the rest.

These defects are compounded by the problem that the district court's test does not even require plaintiffs to prove that a districting map had a meaningful impact on First Amendment activity; anything more than a "*de minimis*" "chilling effect"

will suffice. JS.App.287-88. Plaintiffs applaud the court's refusal to adopt a "heightened demonstration of effect or burden." CC.Br.56. But a test that would let virtually any plaintiff in the door and would invalidate any map that sought any degree of partisan advantage would require nothing short of "the correction of all election district lines drawn for partisan reasons." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

3. Sections 2 and 4 of Article I

The Common Cause plaintiffs likewise stand alone in defending the district court's Article I tests. JS.App.35. No other court in history has endorsed those tests—likely because it strains credulity to claim that the very same constitutional text that clearly contemplates districting by partisan entities is the font of administrable limits on partisanship. Indeed, when the *Vieth* plaintiffs suggested that partisan gerrymandering violates the Elections Clauses, the plurality resoundingly rejected the argument, 541 U.S. at 305, and Justice Kennedy agreed "that the standards proposed ... by the parties before us ... are either unmanageable or inconsistent with precedent, or both," *id.* at 308. No other Justice hinted that Article I supplied any answers.

The Common Cause plaintiffs nonetheless claim that partisan gerrymandering violates Article I because it allows legislatures to "dictate electoral outcomes" and "favor or disfavor a class of candidates." CC.Br.60. But if intentionally altering district lines amounts to unconstitutionally "dictating electoral outcomes," it is hard to understand how legislatures could try to achieve even proportional representation

consistent with the Constitution, as that too involves the "wiggl[ing] and joggl[ing]" of "boundary lines." *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973).

More fundamentally, plaintiffs overlook the problem that, under their theory, *any* map unconstitutionally "dictates electoral outcomes." After all, the legislature has to draw district lines *somewhere*, and "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Id.* at 753. By their logic, then, "All Districting is 'Gerrymandering.'" *Vieth*, 541 U.S. at 289 (plurality op.). This Court has not struggled for three decades only to embrace such a patently overinclusive and ahistoric test.

IV. The 2016 Map Is Not An Unconstitutional Partisan Gerrymander In All Events.

Even if the Court were inclined to leave the door to partisan gerrymandering claims ajar, the 2016 Map should still stand. Plaintiffs do not dispute that the map beats every other North Carolina congressional districting map in recent memory as a matter of traditional districting principles. Op.Br.57-60. The map thus would survive even under the tests proposed by the dissenting Justices in *Vieth*, as each of those tests would have put maps that substantially adhere to traditional districting principles on the constitutional side of the lines they endeavored to draw. *See* 541 U.S. at 318 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting); *id.* at 360 (Breyer, J., dissenting). The Common Cause plaintiffs insist that since compliance with traditional districting principles does not necessarily save a map in the racial

gerrymandering context, it should not suffice here either. CC.Br.62. But that once again draws the false equivalence between race and politics that a majority of this Court has repeatedly rejected. *See, e.g.*, *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring).

Ultimately, plaintiffs' argument reduces to the claim that this Court should condemn the 2016 Map simply because the redistricting committee "overt[ly]" stated that partisan advantage was one of its criteria. CC.Br.1; LWV.Br.3. But while plaintiffs attempt to equate that to "an official state policy to maximally degrade the representation of disfavored voters," LWV.Br.3, that is wrong as a matter of fact. As is evident on the face of the committee's actual criteria, the committee sought merely to "make reasonable efforts ... to maintain the current partisan makeup of North Carolina's congressional delegation," while complying with traditional districting criteria. JS.App.20. The committee could have sought to increase Republican seats at all costs—but that would have required abandoning the traditional districting principles that plaintiffs conveniently neglect to mention were part of the same "official state policy." *See* Dkt.110-3:167-68.

Plaintiffs' argument also ignores the context in which the partisan advantage criterion was adopted, which confirms that it was overt not because the legislature sought to maximize partisan advantage at all costs, but because the legislature wanted to avoid once again falling into the trap of being accused of *racial* gerrymandering if their embrace of political considerations was insufficiently clear. Op.Br.59. The 2016 Map is thus hardly the "extreme" gerrymander

that plaintiffs contend; indeed, it is not materially different from the maps this Court upheld in *Bandemer* and *Vieth*, which were backed with similarly hyperbolic claims. Moreover, adopting a prohibition not against partisan gerrymandering, but against forthright acknowledgement of a partisan motive, would not address the problems plaintiffs perceive going forward. Instead, it would just punish the legislature for relying on *this Court's own assurance*—to the North Carolina General Assembly itself, no less—that a legislature may "engage in constitutional political gerrymandering." *Cromartie I*, 526 U.S. at 551.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Appellants Robert A. Rucho, David R. Lewis, Timothy K. Moore, and Philip E. Berger

March 19, 2019